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In the Supreme Court of the United States

OCTOBER TERM, 1980

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION

and

MALLEABLE IRON RANGE COMPANY

HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-885

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION

and

MALLEABLE IRON RANGE COMPANY

No. 80-1103

HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

1. The Board's practice in 1947 was to treat nonmanagerial "confidential employees" as protected by the National Labor Relations Act, but to exclude from bargaining units of other employees those confidential employees (such as confidential secretaries to labor relations management personnel) with access to labor relations information that might prejudice the employer's position in dealing with the union if

disclosed prematurely (see NLRB Br. 17-24).[1] However, respondents contend (Hendricks Br. 8-15; Malleable Br. 4-7) that the 1947 Congress rejected this "labor nexus" test in favor of a test that would exclude from the protection of the Act all employees who receive from their employers *any* information that is confidential and not available to the public, to competitors, or to employees generally. The most striking deficiency of respondents' argument, as we

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[1] Hendricks relies (Br. 16, 37-38) on three Board decisions to support its argument that the Board determined confidential status "without regards to labor relations" before 1947. In *E.P. Dutton & Co.*, 33 N.L.R.B. 761, 766-767 & n.8 (1941), however, the Board explicitly relied on "labor nexus" grounds in excluding from a bargaining unit secretaries to management officials, and quoted at length from the Board's seminal "labor nexus" decision, *Brooklyn Daily Eagle*, 13 N.L.R.B. 974 (1939). In *Montgomery Ward & Co.*, 36 N.L.R.B. 69, 73 & n.6 (1941) (excluding secretaries to store managers), the Board merely followed its decision in *E.P. Dutton & Co.* Similarly, in *Burke Brewery, Inc.*, 54 N.L.R.B. 1061, 1062 (1944), the Board excluded an individual who served as "office manager, head bookkeeper, and secretary to the company president, to whom he [wa]s also related by marriage"—*not* because of his access to confidential business information, but because of his unique status, interests, and functions, which set him apart from the rank-and-file employees included in the unit. Moreover, in *Hudson Motor Car Co.*, 55 N.L.R.B. 509 (1944), and *Barrett Div., Allied Chem. & Dye Corp.*, 65 N.L.R.B. 903 (1946), two cases cited by the Court in *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 276 (1974), the Board clearly applied the "labor nexus" test. In *Hudson Motor Car Co., supra*, 55 N.L.R.B. at 511, the Board stated: "Although it appears that the work of the employees * * * has its confidential aspects, it is not concerned with labor relations. The possession of information which the Company regards as secret, however, is not of itself sufficient to justify depriving these employees of the right to collective bargaining." Accord, *Barrett Div., supra*, 65 N.L.R.B. at 905-908.

have shown previously (NLRB Br. 24-29, 34-37), is that it relies not on any statutory provision that Congress enacted in 1947, but on a provision that was proposed and rejected at that time. See also AFL-CIO Br. 13-23, 25-29. Indeed, the legislative history of the 1947 amendments clearly demonstrates that Congress explicitly decided *not* to legislate concerning confidential employees, but to leave standing the Board's practice with respect to such persons.[2]

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[2] On June 5, 1947, Senator Taft explained to the Senate the action taken by the conferees, and he submitted a written summary, which stated in relevant part (93 Cong. Rec. 6442 (1947); II NLRB, *Legislative History of the Labor Management Relations Act, 1947* ("*Leg. Hist.*") 1537 (1948) (emphasis added)):

> (8) Supervisors: Both the House bill and the Senate amendment excluded supervisors from the individuals deemed to be employees for the purposes of the act. There was a sharp divergence between the House and Senate, however, with respect to the occupational groups which fell within this definition. *The Senate amendment, which the conference ultimately adopted, is limited to bona fide supervisors. The House had included numerous other classes.* The[se] were generally (A) certain personnel who fix the amount of wages earned by other employees, such as inspectors, checkers, weightmasters, and time-study personnel, (B) labor relations personnel, police, and claims personnel, and (C) confidential employees. *The Senate amendment confined the definition of supervisor to individuals generally regarded as foremen and employees of like or higher rank.*

After submitting this written summary, Senator Taft stated on the Senate floor (93 Cong. Rec. 6445 (1947); II *Legis. Hist.* 1544 (emphasis added)):

> We accepted a provision regarding plant guards. We had exempted foremen in the Senate bill, but we had not exempted plant guards. The House bill exempted plant guards, and also time-study employees and personnel forces. *We did not accept any of those provisions,* ex-

Respondents' reliance (Hendricks Br. 31-33; Malleable Br. 4-7) on this Court's decision in *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267 (1974), is likewise misplaced. It is true that the Court there observed (416 U.S. at 283-284 n.12) that the 1947 Conference Committee Report (H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. (1947)) indicates that Congress understood the contemporaneous Board practice to require a categorical exclusion of "confidential employees," comparable to the exclusion contained in the House bill that was not enacted. However, as we pointed out in our opening brief (Br. 33-37), this observation was not essential to the Court's holding in *Bell Aerospace*, and it involves an issue that was not there fully explored by the parties because they had no need to do so. See *Lehman* v. *Nakshian*, No. 80-242 (June 26, 1981), slip op. 9 n.13; *McDaniel* v. *Sanchez*, No. 80-180 (June 1, 1981), slip op. 10-11; *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, No. 79-1944 (May 18, 1981), slip op. 5 n.3. Moreover, we believe that the Court's observation does not truly reflect the meaning of the Conference Report, which

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cept that as to plant guards we provided that they could have the protection of the Wagner Act only if they had a union separate and apart from the union of the general employees.

Respondents' argument would obviously have great force if the 1947 Congress had accepted the definition of "supervisor" contained in the House bill (H.R. 3020, 80th Cong., 1st Sess. § 2(12)(C) (1947)). However, the House definition did not prevail, and Congress declined to overrule the Board's practice concerning "confidentials" when it declined to amend the statutory definition of "employee" (see Section 2(3) of the Act, 29 U.S.C. 152(3)) to exclude "confidential employees." It is certainly a novel principle of statutory construction that the meaning of a statute is to be found in a provision that Congress could have enacted, but specifically rejected.

states in relevant part (H.R. Conf. Rep. No. 510, *supra*, at 35):

> In the case of persons working in the labor relations, personnel[,] and employment departments, it was not thought necessary to make specific provision, as was done in the House bill, since the Board has treated and presumably will continue to treat, such persons as outside the scope of the [A]ct. This is the prevailing Board practice with respect to such people as confidential secretaries as well, and it was not the intention of the conferees to alter this practice in any respect. * * *

When read in the context of what the Conference Committee actually did, this statement shows only that Congress intended to continue "the prevailing Board practice" with respect to "confidential secretaries" and "persons working in the labor relations, personnel[,] and employment departments." It does not suggest that Congress intended to exclude from the Act the broad class of persons included in the House bill's definition of "confidential employees" (see pages 3-4, note 2, *supra*). And, as we shall show (see also page 2, note 1, *supra*; NLRB Br. 17-24), "the prevailing Board practice" with respect to the persons described in the Conference Report was merely to exclude them from bargaining units with other employees when they had access to labor relations information which (if prematurely disclosed) might prejudice an employer in dealing with the union.[3]

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[3] Indeed, it was precisely because Congress correctly understood the Board's prevailing practice with respect to confidential employees that the House initially thought it necessary to enact the more expansive exclusion that was rejected in Conference. Thus, the House Report stated (H.R. Rep. No. 245, 80th Cong., 1st Sess. 23 (1947) (emphasis added)):

Finally, the broad exclusionary rule urged by respondents is inconsistent with the fundamental statutory policy because it would delegate to employers the power to determine unilaterally whether employees are entitled to the protection of the Act. In this practical sense, this case is far different from *Bell Aerospace*, which involved "managerial" employees who had "abandoned the 'collective security' of the rank and file voluntarily, because they believed the opportunities thus opened to them to be more valuable to them than such 'security' " (416 U.S. at 281 n.11, quoting H.R. Rep. No. 245, 80th Cong., 1st Sess. 16-17 (1947)). Under respondents' broad rule, however, employees would become "confidential employees," not by their own choice, but by the choice and for the convenience of their employer. See NLRB Br. 33-34, 37-39. If the Act excluded every employee who receives information that is of a confidential nature, and that is not available to the public, to competitors, or to employees generally, an employer could unilaterally deprive countless employees of the protection of the Act simply by choosing to share with them some part of his "endless" store of "confidential" information (Pet. App. 12a; Cudahy, J., dissenting). Thus, in rejecting the House bill's

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Most of the people who would qualify as "confidential" employees [under the House bill] are executives and are excluded from the act in any event.

The Board, itself, normally *excludes from bargaining units* confidential clerks and secretaries to such people as these. But protecting confidential financial information from competitors and speculators, protecting secret processes and experiments from competitors, and protecting other vital secrets ought not to rest in the administrative discretion of the Board or on the responsibility of whatever union happens to represent the employees. The bill therefore *excludes from the definition of employees* persons holding positions of trust and confidence whose duties give them secret information.

broad exclusion, the 1947 Congress recognized that "most employees have an arguably confidential relationship with management" (*Union Oil of California, Inc.* v. *NLRB*, 607 F.2d 852, 853 (9th Cir. 1979)), and that the overall balance of the Act would be substantially altered if employees were to be deprived of the protection of the Act on that basis. If Congress had intended to rest such important rights upon such fragile ground, it certainly would have manifested that intention with greater clarity than the legislative record here suggests.

2. In contrast to respondents, amicus Chamber of Commerce concedes (Br. 9-10) that Congress rejected the House bill's broad definition of "confidential employee," in favor of continuing the Board's prior practice of treating as confidential employees only those with a "labor nexus." However, the Chamber contends (Br. 3) that the Board's present formulation of the "labor nexus" test is "not consistent with the Board's early decisional history and the [1947] congressional understanding" of that history. The Chamber asserts (Br. 3, 6-10, 20-21) that prior to *Ford Motor Co.*, 66 N.L.R.B. 1317 (1946), the Board treated as "confidential" all employees with access to their employer's labor relations information, which was broadly defined as "any information about 'wages, hours, and other terms and conditions of employment' " that had "not been released to rank-and-file employees[;]" that *Ford Motor* limited this exclusion so that employees with confidential labor relations information were excluded only if they assisted in a confidential capacity persons exercising managerial functions in the field of labor relations; and that because Congress was "apparently" unaware of *Ford Motor* in 1947, when it approved the "prevailing Board practice with respect to such people as confidential secretaries" (H.R. Conf. Rep. No. 510,

supra, at 35), Congress must therefore have intended to approve only the Board's earlier and allegedly broader "labor nexus" test. The Chamber's argument lacks merit because it misconstrues both the Board decisions that preceded *Ford Motor* and the effect of that decision.

a. At least eight years of Board decisions prior to *Ford Motor* disprove the Chamber's assertion that the Board was then broadly applying the "labor nexus" test to exclude from bargaining units any employee who had access to any confidential information relating to wages, hours, or other terms and conditions of employment. See NLRB Br. 18-20. In fact, the Board endeavored to limit this exclusion to situations in which employees had access to labor relations information with sufficient strategic significance so that its premature disclosure to the bargaining representative might disadvantage the employer in dealing with the representative.[4] On the one hand, the Board excluded from bargaining units confidential secretaries and clerks to managerial employees who had significant labor relations responsibilities, as well as nonsupervisory employees in labor relations, employment, and personnel departments

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[4] The Board's approach is well-demonstrated by its decision in *Hoover Co.*, 55 N.L.R.B. 1321, 1323 (1944):

> [I]n negotiating and in the settlement of grievances, the interests of a union and the management are ordinarily adverse. Consequently, we have adhered to the opinion that the management should not be required to handle labor relations matters through employees who are represented by the union with which the [c]ompany is required to deal and who in the normal performance of their duties may obtain advance information of the [c]ompany's position with regard to contract negotiations, the disposition of grievances, and other labor relations matters.

Accord, *Brooklyn Daily Eagle*, *supra*, 13 N.L.R.B. at 986. See also NLRB Br. 17-19.

who had access to confidential information concerning the employer's position in collective bargaining negotiations or grievance matters (see NLRB Br. 19 nn. 16 & 17 (collecting cases)). On the other hand, the Board refused to exclude from bargaining units secretaries of managerial personnel who had little or no labor relations policy functions (see NLRB Br. 20 nn. 18 & 19 (collecting cases)) and other individuals who possessed only non-strategic, albeit otherwise confidential, information concerning labor relations or employee matters. Within the latter category were such persons as: payroll clerks with access to admittedly confidential information concerning employee wage rates, salaries, and earnings;[5] timekeepers with access to data on employee hours, output, and productivity;[6] accounting clericals with access to

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[5] See, *e.g.*, *Willys Overland Motors, Inc.*, 10 N.L.R.B. 160, 162 (1938) (payroll clerks, timekeepers, and time checkers with knowledge of employee earnings); *Western Union Telegraph Co.*, 30 N.L.R.B. 679, 685 (1941) (cashier who made wage disbursements); *Chrysler Detroit Co.*, 38 N.L.R.B. 313, 321 (1942) (payroll clerk with access to wage and salary information); *Murray Corp.*, 45 N.L.R.B. 854, 857 (1942) (cashier's office employees with access to payroll data); *Chrysler Corp., Chrysler Motor Div.*, 58 N.L.R.B. 239, 243 (1944) (payroll clerks who ensured that employee paychecks were in correct amount and who knew employee rates of pay and payroll deductions); *Micamold Radio Corp.*, 58 N.L.R.B. 888, 891 (1944) (payroll clerks with access to confidential information concerning pay and earnings of employees).

[6] See, *e.g.*, *Express Publishing Co.*, 8 N.L.R.B. 162, 167-168 (1938) (timekeepers and tally clerks with access to individual employee productivity data); *Chrysler Corp. (Marysville Plant)*, 36 N.L.R.B. 157, 161 (1941) (timekeepers with access to time card data); *Mueller Brass Co.*, 39 N.L.R.B. 167, 171-172 (1942) (checkers and timekeepers with records of each employee's output); *United Aircraft Products, Inc.*, 41 N.L.R.B. 501, 503-504 (1942) (separate unit of timekeepers with information about employee hours accrued, absences, and

projections on manpower needs and data on labor costs;[7] nurses and other employees with access to reports on employee health and disability matters;[8] plant guards and other employees with access to reports on employee misconduct;[9] and personnel clerks with access to files containing employment data con-

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tardiness); *Armour and Co.*, 49 N.L.R.B. 688, 690-691 (1943) (plant clerks who had information concerning production by individual employees and other information available "only to supervisory employees"); *General Motors Corp.*, 52 N.L.R.B. 649, 651, 656 (1943) (core and floor checkers with access to employee piecework data).

[7] See, *e.g.*, *Babcock & Wilcox*, 52 N.L.R.B. 900, 903 (1943) (accounting department employees with access to labor cost information); *Bethlehem Steel Co.*, 63 N.L.R.B. 1230, 1232-1233 (1945) (accounting division clericals with access to labor cost data); *Bethlehem-Sparrows Point Shipyard, Inc.*, 65 N.L.R.B. 284, 288 (1946) (planning and production department employees with access to projected manpower needs and labor cost studies).

[8] See, *e.g.*, *General Motors Corp., Chevrolet Motor Div.*, 53 N.L.R.B. 1096, 1105 (1943) (personnel clerks with access to employee injury reports); *Union Switch & Signal Co.*, 63 N.L.R.B. 974, 979-980 (1945) (stenographers and clerks in relief and pension department who handled matters concerning workmen's compensation and disability claims). See also *Continental Steel Corp.*, 61 N.L.R.B. 97, 99 (1945) (separate unit of nurses, notwithstanding their access to employee health records).

[9] See, *e.g.*, *Frigidaire Div., General Motors Corp.*, 39 N.L.R.B. 1108, 1112 (1942) (separate unit of plant guards with access to "highly confidential" FBI reports concerning employees); *Bethlehem-Hingham Shipyard, Inc.*, 60 N.L.R.B. 1075, 1078 (1945) (investigators conducting initial checks of employee absences and sick leave requests); *Aluminum Co.*, 61 N.L.R.B. 1066, 1073 (1945) (senior account clerk in position to discover employee "peculation"); *Pullman-Standard Car Manufacturing Co.*, 63 N.L.R.B. 822, 824-825 (1945) (plant guards conducting "clearly secret" investigations of employees for FBI and employer concerning thefts).

cerning other employees.[10] Likewise, the Board refused to exclude even employees having access to significant labor relations information, if it was principally historical and related to personnel actions and labor relations decisions already implemented;[11] if it

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[10] See, *e.g.*, *Puget Sound Bridge & Dredging Co.*, 46 N.L.R.B. 1071, 1074 (1943) (personnel clerks with access to historical information concerning each employee); *General Motors Corp.*, *supra*, 52 N.L.R.B. at 655 (timekeepers with access to personnel records listing hirings, transfers, and other personnel actions); *American Steel & Wire Co.*, 58 N.L.R.B. 253, 254-255 (1944) (hospital attendants with access to personnel records for purpose of obtaining information concerning health of employees); *South Bend Lathe Works*, 59 N.L.R.B. 562, 564 (1944) (clericals having access to personnel records to obtain payroll and wage data); *Aluminum Co.*, *supra*, 61 N.L.R.B. at 1072 (accounting and file clerks with access to company records containing confidential information concerning labor relations matters of "principally historical importance"); *American Central Manufacturing Co.*, 65 N.L.R.B. 342, 346-347 (1946) (payroll clerks with access to personnel files containing employment histories of company's employees).

Among other things, these cases clearly show that there is no substance to Hendricks' assertion that, prior to 1966, the Board mechanically excluded from bargaining units "any employees working in a personnel or employment department or with *access* to personnel information" (Br. 47; emphasis in original).

[11] See, *e.g.*, *Puget Sound Bridge and Dredging Co.*, *supra*, 46 N.L.R.B. at 1074 (personnel clerks with access to employment histories; current efficiency ratings kept in separate files); *Aluminum Co.*, *supra*, 61 N.L.R.B. at 1072 (file clerk with access to information concerning labor matters that were "no longer current"); *American Central Manufacturing Corp.*, *supra*, 65 N.L.R.B. at 346-347 (payroll clerks with access to personnel files, where there was "no evidence * * * that in the course of their employment they acquire advance information as to the [c]ompany's position on issues which are likely to be the subject of grievance conferences or collective bargaining").

was available only in an unformulated or raw form;[12] or if access to the information was sporadic or narrowly circumscribed by management.[13]

b. In 1946, of course, the Board concluded in *Ford Motor Co., supra*, 66 N.L.R.B. at 1322, that the "labor nexus" test, as previously applied, was "too inclusive and needlessly preclude[d] many employees from bargaining collectively together with other workers having common interests." Thus, the Board announced that it was limiting the term "confidential" so as "to embrace only those employees who assist and act in a confidential capacity to persons who exercise 'managerial' functions in the field of labor relations" (*ibid.*).[14] In 1956, the Board reaffirmed

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[12] See, *e.g.*, *Frigidaire Div., General Motors Corp., supra*, 39 N.L.R.B. at 1112 (plant guards who "merely report the facts" concerning employee misconduct that may later be the subject of grievance proceedings); *General Motors Corp., Chevrolet Motor Div., supra*, 53 N.L.R.B. at 1105 (clerks with access to injury reports where employer's position on liability and compensation was formulated by individuals in separate division); *Bethlehem-Hingham Shipyard, Inc., supra*, 60 N.L.R.B. at 1078 (investigators who conducted only initial investigation concerning employee absences and sick leave requests); *Bethlehem-Sparrows Point Shipyard, Inc., supra*, 65 N.L.R.B. at 288 (planning and production department employees with access to projected labor cost data and manpower needs).

[13] See, *e.g.*, *General Motors Corp., Chevrolet Motor Div., supra*, 53 N.L.R.B. at 1107 (record clerks who "occasional[ly]" filed personnel department records); *Chrysler Corp., Chrysler Motor Div., supra*, 58 N.L.R.B. at 246 (office service department employees who handled labor relations information "in some small measure"); *Pacific Gas & Electric Co.*, 61 N.L.R.B. 564, 567-569 (1945) (payroll clerks with restricted access to personnel records).

[14] In *Ford Motor Co., supra*, the Board therefore upheld a bargaining unit composed of time-study employees, overruling such cases as *Yale & Towne Manufacturing Co.*, 60

this limitation in *B.F. Goodrich Co.*, 115 N.L.R.B. 722.

The Chamber, however, misconceives the import of *Ford Motor*. Contrary to the Chamber's assertions (Br. 3, 8), the Board's modification of the "labor nexus" test did not result in an exclusion limited to "the confidential assistants to a company's labor relations manager and virtually no one else," and it did not result in the inclusion in bargaining units of "most, if not all, of the employees excluded in cases like *Hoover*." Indeed, the Board has continued to treat as confidentials, not only secretaries and assistants to *all* persons with managerial functions in the field of labor relations (see, e.g., *Missouri Pacific Employees' Hospital Association*, 251 N.L.R.B. 1547, 1549-1550 (1980)), but also other individuals who have access to strategic labor relations information such as that described in *Hoover*. Thus, as the Board stated in *American Radiator & Standard Sanitary Corp.*, 119 N.L.R.B. 1715, 1720 (1958) (footnote

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N.L.R.B. 626 (1945), and *Consolidated Vultee Aircraft Corp.*, 54 N.L.R.B. 103 (1943), in which the Board had held such employees to be confidential or managerial. See 66 N.L.R.B. at 1322 & n.12.

The Board's modification in *Ford Motor* of the "labor nexus" test was fully described in a report (11 *NLRB Ann. Rep.* 32 & nn.18-21 (1947)) that was submitted to Congress on January 3, 1947, five months before the Conference Committee issued its report. It is therefore extremely unlikely that this modification "escaped the notice of Congress" (Chamber Br. 9). At all events, even if Congress was in fact unaware of the *Ford Motor* formulation, nothing in the Conference Report suggests that Congress would have disapproved this formulation if it had been brought to Congress' attention. Indeed, the conferees expressly approved (see H.R. Conf. Rep. No. 510, *supra*, at 35) the granting of statutory protection to the very group of employees—time-study personnel—which the Board had held *not* to be "confidentials" in *Ford Motor*, but which had been excluded under the Board's earlier practice.

omitted), "It is the Board's customary practice to exclude from bargaining units employees who act in a confidential capacity to officials who formulate or effectuate general labor relations policies, or who, in the course of their duties, regularly have access to information concerning anticipated changes which may result from collective-bargaining negotiations." [15] Likewise, in *Pullman Standard*, 214 N.L.R.B. 762-763 (1974), the Board stated:

> The Board has in the past denied eligibility in representation elections to those employees who, in the course of their duties, regularly have access to confidential information concerning anticipated changes which may result from collective-bargaining negotiations.[2] We regard such employees as specially aligned with the employer's interests in the area of labor relations, even absent the showing of a confidential work relationship with a specifically identifiable managerial employee responsible for labor policy.

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[2] *American Radiator & Standard Sanitary Corporation*, 119 N.L.R.B. 1715 (1958).

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[15] In *American Radiator, supra*, 119 N.L.R.B. at 1720-1721, the Board refused to exclude as a confidential employee a personnel clerk who compiled statistical data, but had no knowledge of labor policy proposals which might result therefrom. Compare *American Lithofold Corp.*, 107 N.L.R.B. 1061, 1065 (1954) (excluding general bookkeeper and chief payroll officer with access to information concerning anticipated changes in employer's pay scale that would result from negotiations with the union); *Potomac Electric Power Co.*, 111 N.L.R.B. 553, 562 (1955) (excluding clerk-stenographers and clerk-typists "who in the course of their duties regularly have access to information concerning anticipated changes which may result from collective-bargaining negotiations"); *Triangle Publications, Inc.*, 118 N.L.R.B. 595, 596 & nn.3, 4 (1957) (excluding payroll clerks with access to data "showing the effect of wage adjustments contemplated in labor contract negotiations"); *Pullman Standard, Div. of Pullman, Inc.*, 214

c. In sum, the Board's reformulation in *Ford Motor* and *B.F. Goodrich* of the "labor nexus" test served to clarify this exclusion and enhance the consistency of its application, but did not significantly alter its scope.[16] Both before and after this reformulation, the "labor nexus" test was applied to exclude only those employees having access to confidential labor relations information which, if revealed to the union, could compromise the employer's position in collective bargaining or grievance matters. See *Liberty Homes, Inc.*, 216 N.L.R.B. 1102, 1106 (1975)

N.L.R.B. 762-763 (1974) (excluding labor costs estimators who regularly use employer documents disclosing managerial estimates of the anticipated results of future labor contract negotiations).

[16] The categories of employees principally affected by the modification, in addition to time-study personnel (see pages 12-13, note 14 *supra*), would appear to be secretaries or assistants to persons who merely effectuate—but play no part in the formulation of—management's labor policies. Compare *Minneapolis-Honeywell Regulator Co.*, 107 N.L.R.B. 1191, 1192 (1954) (excluding secretaries to department heads with supervisory duties who did not formulate labor policy), overruled in *B.F. Goodrich Co., supra*, 115 N.L.R.B. at 724 n.7, with *Eastern Corp.*, 116 N.L.R.B. 329, 333 (1956) (declining to exclude secretaries to department heads, but treating as "confidential" secretaries to vice president, treasurer, and service director who formulated labor policy). See also pages 16-17, note 17, *infra*. Thus, the Board has held that the tripartite *Ford Motor-B.F. Goodrich* "formulate, determine, and effectuate" test is to be applied "in the conjunctive" (*Weyerhaeuser Co.*, 173 N.L.R.B. 1170, 1172 (1968)), so that the exclusionary sweep of the test is limited to assistants to true "managerials" (as traditionally defined by the Board) in the field of labor relations. See *NLRB* v. *Yeshiva University*, 444 U.S. 672, 682 (1980), quoting *NLRB* v. *Bell Aerospace Co., supra*, 416 U.S. at 288 ("[m]anagerial employees are defined as those who 'formulate and effectuate management policies * * *' ").

(Board's policy is to exclude from bargaining units "employees, who by reason of duties which enable them to obtain their employer's secret labor relations information, would be in a position to pass such information on to the employees' bargaining representative").[17]

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[17] The cases cited by the Chamber (Br. 12-15) and Hendricks (Br. 22), in which the Board declined to confer confidential status on various employees, are not to the contrary. Several of these cases rest on specific factual findings by the Board that the individuals in question had no access to labor relations policy information: *United States Postal Service*, 232 N.L.R.B. 556, 558 (1978) ("[n]or does it appear that these secretaries have access to labor relations policy data"); *California Inspection Rating Bureau*, 215 N.L.R.B. 780, 783 (1974) ("[n]either employee is involved in typing correspondence nor preparing documentation or other information which is directly related to the labor relations functions of the unit"); *Hudson Waterways Corp.*, 193 N.L.R.B. 378, 380 n.7 (1971) (no evidence that employees in question were "actually privy to management's exchanging of views about labor policy in the performance of their regular duties"); *Hotel Employers Association*, 159 N.L.R.B. 143, 150 (1966) ("we find that these secretaries and clerks * * * are not sufficiently concerned with labor relations matters to be considered confidential employees"); *Westinghouse Electric Corp., Small Motor Div.*, 138 N.L.R.B. 778, 781 (1962) (industrial relations assistants "are not in a position to learn of matters relative to future policies, are not consulted in that regard, and have no access to information used by management in collective-bargaining negotiations").

With one exception, the rest of the Board decisions, upon which Hendricks and the Chamber rely, rest upon specific factual findings that the principals of the individuals whose status was at issue were not sufficiently involved with labor relations policymaking to raise any presumption that they had access to labor relations policy information: *California Inspection Rating Bureau, supra*, 215 N.L.R.B. at 783 (employees in question "do not work under an official who is directly involved in personnel decisions"); *Empire Mutual Insurance Co.*, 195 N.L.R.B. 284, 286 (1972) ("there is no evidence, and in fact there is no contention, that the [em-

3. For at least 40 years, therefore, the Board has excluded from bargaining units both confidential assistants to labor relations managerials and other employees having advance access to strategic labor relations information, but not employees who have access either to other types of labor-related information or to non-labor-related confidential information. Not only does the Board's rule safeguard the interest of employers in maintaining the confidentiality of strategic labor relations information, but it also accords full statutory protection to the greatest possible number of employees. It is because this rule reflects the fundamental policy of the National

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ployee's superior] formulates, determines, and effectuates management policy in the field of labor relations"); *Holly Sugar Corp.*, 193 N.L.R.B. 1024, 1025 (1971) (employee's superior made "mere administrative determinations" with respect to processing of "routine" grievances while "serious," "novel," and "policymaking" grievance matters were handled by higher management); *Weyerhaeuser Co.*, 173 N.L.R.B. 1170, 1172-1173 (1968) (secretaries' superiors were not "called upon to play any role in the formulation or determination of labor policies"); *Ethyl Corp.*, 118 N.L.R.B. 1369, 1371 (1957) (employees' superiors had "limited participation" in labor relations policy, confined to such matters as "accumulat[ing] factual data," but Board excluded as "confidentials" secretaries to members of employer's contract negotiating and labor relations policymaking committees); *Eastern Corp., supra*, 116 N.L.R.B. at 333 (employees' superiors had minor input of "advisory" nature in labor relations policymaking, but Board excluded as "confidential" secretaries to management officials who served in labor relations policymaking roles); *Curtiss-Wright Corp.*, 31 L.R.R.M. 1005 (1952) (employees' superior "does not make recommendations as to the disposition of grievances nor participate in meetings").

Finally, in *John Sexton & Co.*, 224 N.L.R.B. 1341 (1976), the Board found on the facts that the employee at issue did not enjoy a confidential relationship with her superior—either as a general matter, or with specific respect to labor relations matters.

Labor Relations Act, by maintaining a careful balance between these important and conflicting interests, that it has proved a workable guide for resolving an extremely delicate issue of labor-management relations during a period of substantial industrial change. Indeed, because the ever-increasing complexity of industrial and commercial life has greatly increased the number of employees who must have access to "confidential" information to perform their duties as employees, the balance of interests represented by the "labor nexus" test may now constitute a far more important part of American labor law than it was when first articulated. See NLRB Br. 37-39.

The Board's rule is based on the view, confirmed by 40 years of administrative experience, that there is no inherent incompatibility between "union membership * * * [and] an employee's duty of loyalty to his or her employer, even when that duty involves a responsibility to maintain confidentiality." *Dunn & Bradstreet, Inc.*, 240 N.L.R.B. 162, 163 (1979). Moreover, as the Board has often observed, the most effective means for discouraging breaches of confidentiality is "for the [e]mployer to discipline [offending employees], not for [the Board] to preclude their organizational freedom." *American Window Glass Co.*, 77 N.L.R.B. 1030, 1032 (1948). See also NLRB Br. 20-21.

These considerations apply not only to information concerning non-labor-related matters (such as trade secrets and customer lists),[18] but also to most personnel and labor relations information (whether it be confidential information concerning wages and

[18] Unlike Hendricks and Malleable, the Chamber concedes that access to non-labor-related confidential information should not deprive employees of the full protection of the Act. See Chamber Br. 2, 3-4, 9-10, 19.

hours, raw data from which labor policy decisions will be made, or information concerning personnel decisions already reached). Employees have no more incentive to disclose such nonstrategic labor-related information, simply because they are union members, than they have to disclose other types of confidential information.[19]

On the other hand, the Board's rule recognizes that strategic labor relations information stands on an altogether different footing. The relationship of employers and employees is clearly and necessarily an adversarial one with respect to negotiations over terms and conditions of employment and the resolution of grievances. See *Hoover Co., supra*, and *Brooklyn Daily Eagle, supra*. In such circumstances, there

[19] For example, it may be assumed that employees will be curious to compare the wages they earn with those earned by other employees. There is no reason to assume, however, that union members would be more curious about such matters than non-union employees, or that such curiosity would be more likely to cause union members to breach a duty of confidentiality. Indeed, the contrary may well be true because employees who are union members, unlike non-union employees, have available a legitimate and lawful means for compelling the disclosure of such information. Under Section 8(a)(5) of the Act, 29 U.S.C. 158(a)(5), an employer must furnish to the employees' bargaining representative any information that is relevant to the representative's ability to bargain effectively on behalf of the unit (see *NLRB* v. *Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967); *NLRB* v. *Truitt Manufacturing Co.*, 351 U.S. 149, 152-154 (1956)), and it is beyond cavil that information directly related to the mandatory subjects of bargaining enumerated in Section 8(d) of the Act, 29 U.S.C. 158(d)—namely, "wages, hours, and other terms and conditions of employment"—is sufficiently "relevant" to bargaining to require its disclosure by the employer. See, *e.g.*, *Whitin Machine Works*, 108 N.L.R.B. 1537, 1538-1539 (1954), enforced, 217 F.2d 593 (4th Cir. 1954), cert. denied, 349 U.S. 905 (1955); *Boston Herald-Traveler Corp.* v. *NLRB*, 223 F.2d 58 (1st Cir. 1955).

is an obvious incentive for employees privy to such strategic information to breach their duty of confidentiality and share such information with their bargaining representative, who may be able to use it in obtaining concessions from the employer. This incentive is sufficiently strong to warrant the exclusion of such employees from the bargaining unit. Moreover, the potential damage to the employer is far greater with respect to a breach of confidentiality concerning strategic labor relations information than in the case of other confidential labor-related information.[20] It is eminently reasonable, therefore, for the Board to treat as "confidential employees" under the Act only those who have access to confidential labor relations information which, if prematurely revealed to the union, could compromise the employer's position in collective bargaining negotiations or grievance matters.

The judgments of the court of appeals should be reversed insofar as enforcement of the Board's orders was denied.

Respectfully submitted.

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[20] Unauthorized disclosures of non-strategic, but nonetheless confidential, labor-related information may be relatively harmless to the employer because, as we have suggested (see page 19, note 19, *supra*), employees who have a bargaining representative have lawful means for securing most of this type of information in any event. Conversely, if employees confide strategic labor relations information to their union representative, the employer's bargaining position will almost certainly be prejudiced. This potential for damage is particularly pernicious because an employer may not even be aware that a union is privy to its bargaining strategy.

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